Investor briefing:

SA companies' virtual AGM arrangements risk non-compliance with Companies Act

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Virtual-only annual general meetings create significant risks for listed companies if they do not ensure meaningful shareholder participation. Some of SA's best known blue-chips will be using virtual AGM platforms which allow for moderation of questions before they are submitted to the board. This is contrary to the provisions of the Companies Act, and creates potential for abuse of these systems to avoid accountability and infringe shareholder rights, warns responsible investment NPO, Just Share.

Just Share has produced a guide setting out **best practices for South African virtual-only AGMs** to help ensure that these meetings comply with the law and enhance, rather than inhibit, shareholder participation.

Annual general meetings (AGMs) provide essential opportunities for shareholders to interrogate company decision-making and hold boards to account. The COVID-19 pandemic and social distancing requirements mean that a growing number of **electronic or virtual-only AGMs** are now being announced.

While virtual-only AGMs are a responsible alternative at a time when far-reaching restrictions aim to slow the spread of the coronavirus, **the virtual-only AGM format increases the risk of infringement of shareholder rights**.

Some companies have already placed worrying restrictions on the ability of shareholders to ask questions at these meetings, which is contrary to the provisions of the Companies Act. According to Section 63(2) of the Companies Act, virtual meetings are only permissible if the electronic communication employed **enables all meeting participants to communicate concurrently with each other without an intermediary**.

In addition, Section 61(8) of the Act lists the minimum items of business that must be transacted at an AGM, and this includes **any matters raised by shareholders, with or without advance notice to the company**.

If a company holds a virtual-only AGM and does not allow shareholders to ask questions in real time, without moderation, or requires all questions to be submitted in advance, that meeting will not constitute an AGM for the purposes of the Companies Act.

The JSE wrote to all companies listed on the exchange on 17 March, reminding them that shareholders' meetings are primarily governed by the provisions of the Companies Act and that companies must ensure that these meetings comply with the applicable statutory provisions.

The JSE has partnered with The Meeting Specialist (TMS) "*to launch the first virtual AGMs in South Africa to enable clients to engage with shareholders when the country is faced with tackling* *the Covid-19 pandemic*". However, the description of TMS' "mobile meeting services" on its website states that questions submitted to the board via its app can be moderated.

A number of companies, including the JSE, Old Mutual, Exxaro and Grindrod have announced that their electronic-only AGMs will be provided via TMS. If the questions submitted to the board through the app are moderated, this will be at odds with the Companies' Act requirements that shareholders must be able to communicate with the board without an intermediary.

The TMS platform is not the only electronic AGM provider with this problem. **Standard Bank's** "Online shareholders' meeting guide" states that "Questions sent via the Lumi AGM online platform will be moderated before being sent to the chairman. This is to avoid repetition and remove any inappropriate language".

Adding to the confusion is the fact that almost every company is approaching the process and mechanisms for announcing and holding virtual AGMs differently. The JSE should establish guidelines for alignment of information to allow easy participation by shareholders which is in line with the provisions of the Companies Act.

Shareholders must be able to ask questions and have them answered by the board without moderation and without being forced to submit them in written format in advance. If shareholders cannot interact directly with the board at an annual general meeting, the very purpose of the AGM is undermined: after all, shareholders can already submit written questions to the board whenever they wish to. Furthermore, companies must ensure that new arrangements for electronic AGMs do not frustrate and inhibit shareholder attendance and participation at these meetings.

Companies should commit to conducting in person or hybrid AGMs as soon as it is considered safe to do so.

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